IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 12.03.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

S.A.No.770 of 1997

Sivanesan Chettiar (D1) .. Appellant

Vs.

1.Sivalochanai Ammal (1st Plaintiff)
2.Sinekavalli (2nd Plaintiff)
3.Thiyagaraj Chettiar (D3)
4.V.Jagadeesan (D4)
5.V.Janarthanan (D5)
6.Rathinambal (D6) .. Respondents

Prayer: This second appeal has been preferred under section 100 of CPC against the decree and Judgment dated 30.10.1996, in A.S.No.30 of 1995 passed by the Subordinate Judge, Tiruvannamalai, confirming the decree and judgment dated 23.11.1994 in O.S.No.700 of 1983 on the file of the Additional District Munsif, Tiruvannamalai.

For Appellant : Mr.P.Mani

For Respondents : Mr.J.Ramakrishnan (For R1, R2, R3 & R6)
for M/s. Sarvabhauman Associates
Mr.S.Sivakumar (For R4 & R5)

JUDGMENT

This appeal has been preferred against the decree and judgment in A.S.No.30 of 1995 on the file of the Court of Subordinate Judge, Tiruvannamalai. The unsuccessful first defendant before the courts below is the appellant herein.

2. The short facts in the plaint relevant for the purpose of deciding this appeal sans irrelevant particulars are as follows:-

2(a) The plaintiffs are the legal heirs of one Kuladai Chettiar who died intestate in 1960. Kulandai Chettiear's father Appadurai Chettiar left behind four sons viz. Thukka Chettiar, Kulandai Chettiar and the defendants 2 & 3 as his heirs. The first defendant is the 2nd son of Thukka Chettiar. Thukka Chettiar died

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about 8 years back leaving behind the 1st defendant and another Rajamani. Rajamani had executed a release deed even during the life time of Thukka Chettiar relinquishing his rights in the joint family property.

2(b) Appadurai Chettiar and his son Thukka Chettiar, the sons of Appadurai Chettiar through first wife got themselves divided the property under the partition deed dated 31.12.1927. Under the said partition deed, 'D' schedule properties were kept in common for doing charity and to pay maintenance to one Chellammal out of the income from the 'D' schdele properties. It was provided that the management of the trust properties must be done by the male descendants in the family. After paying the maintenance and doing the charities, the balance income from the trust properties must be equally divided among the 5 sharers.

2(c) Appadurai Chettiar and his 3 sons through the 2nd wife viz. Kulandai Chettiar and the defendants 2 & 3 have partitioned the property under the partition deed dated 19.12.1939. Under the said partition deed, the trust properties were shown under 'E' schedule and kept in common to be administered by the male descendants. After the payment of maintenance to Chellammal and after meeting the charitable expenses, the balance must be according to the 2nd partition deed dated 12.12.1939, divided equally among the 4 sharers. As per the recitals in the partition deed dated 19.12.1939 it is pertinent to note that the management of the trust properties were alone entrusted to the male descendants. In fact, during his life-time, Thukka Chettiar was paying the plaintiffs their due shares in the balance income derived from the trust properties.

2(d) In a family arrangement, the 3rd defendant became the manager of the trust properties and at present the 1st defendant is managing the trust properties. All the three defendants are contemplating to sell away the trust properties and appropriate the sale proceeds. In fact, they have no right to sell the trust properties and their obvious intention is to deprive the plaintiffs from their shares out of the income from the trust properties.

2(e) The 2nd defendant died pending the suit leaving behind 2 sons viz. the defendants 4 & 5 and a daughter viz. the 6th defendant. The defendants 4 to 6 are legal heirs of the deceased 2nd defendant. The plaintiffs issued a lawyer's notice dated 22.4.1983 calling upon the defendants to desist from alienating or subjecting to encumbrance the trust properties and also to pay the plaintiffs their 1/4h share out of the balance income from the trust properties. The defendants are also laible to pay mesne profits at the rate of Rs.1,500/- per month towards their ¼ share for the past 3 years. The first defendant alone issued a

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reply notice dated 6.5.1983. In the reply notice the first defendant would content that the plaintiffs failed to contest the suit in O.S.No.262/78 on the file of the Sub-Court, Tiruvannamalai. The plaintiffs are not parties to the said suit and they were not aware of the pendency of the said suit. The decree and judgment in the said suit will not bind the plaintiffs. Hence, the suit.

3. The first defendant has filed a written statement contending as follows:-

As per the terms of the partition deed entered into between Appadurai Chettiar and his sons Thukka Chettiar, 'D' schedule properties were exclusively left of charitable purposes and it has been further observed in the said partition deed that the male descendants shall perform the charity from out of the income derived from the said 'D' schedule property and that the excess amount derived from 'D' schedule property will be equally partitioned among the male descendants. The said Appadurai Chettiar had 4 sons viz. Thukka Chettiar, Kullandai Chettiar, Venugopal Chettiar, Thiyagarajan Chettiar. Thukka Chettiar's sons are Rajamani and the first defenndant. Rajamani had relinquished his right in respect of the family properties. Kullandai Chettiar had no male descendants. After the death of Thukka Chettiar, the first defendant was performing the charity works from out of the income derived from 'D' schedule property. Thiyagarajan had trespassed into the suit property and was enjoying the entire income from the said 'D' schedule property. But he has failed to perform the charity hence the first defendant filed O.S.No.262/78 against the Thiyagarajan Chettiar, Venugopal Chettiar and Rajamani Chettiar for a declaration that he is to be declared as a trustee to perform the charities as per the recitals in the partition deed and also asked for measne profits and also for rendition of accounts from the year 1965 and also for directing the defendants to repay the amount spent by him from 1965 for performing the charity. The said suit was decreed in favour of the plaintiffs as prayed for. The plaintiffs are not the parties to the said suit. The said suit is now pending in appeal before the High Court of judicature at Madras. The plaintiffs even though are not parties to the said suit, they are aware of the pendency of the said suit before the trial court as well as before the High Court. But the plaintiffs have not taken any steps to get themselves impleaded in the suit in O.S.No.262/78 before the trial Court or before the appellate Court. The plaintiffs know well that as per the terms of the partition deed only the male descendants are entitled to administer 'D' schedule property to the earlier partition deed. Kalandai Chettiar died in the year 1963 when Thukka Chettiar was alive. The plaintiffs have not claimed any share in the income from the 'D' schedule property as the Legal Representatives of Kulandai Chettiar and no share was allotted to them while Thukka Chettiar was alive. Thiyagarajan has

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not been given any share in the 'D' schedule property. As per the terms of the partition deed the plaintiffs are not entitled to claim any share in 'D' schedule property. As per the document executed by 3rd defendant in favour of 1st defendant, the 1st defendant alone is entitled to conduct the shops belonging to the charitable trust. The 3rd defendant has already relinquished his right in respect of 'D' schedule property in favour of the 1st defendant. Hence, the plaintiffs are not entitled to claim any share in the income derived from 'D' schedule property. For the suit notice, the 1st defendant has sent proper reply. Plaintiffs are not entitled to claim any mesne profits. The claim of the plaintiffs is barred by adverse possession and also by ouster. Hence, the suit is liable to be dismissed.

4. The 2nd defendant in his written statement would contend that there was an earlier suit in O.S.No.262/78 conducted between the defendants. The 1st defendant-Sivanesan Chettiar had filed the said suit against the other defendants and also against Rajamani. The said suit was decreed directing the 1st defendant-Thiyagarajan Chettiar to submit the accounts to the plaintiff and the question of measne profits was relegated to the separate proceedings under Order 20 rule 21 of CPC. It has been specifically stated in that judgment that only the male descendants are entitled to be trusties of the 'D' Schedule property. The 1st defendant has not preferred any appeal against the decree and judgment in O.S.No.262/78 on the file of the Court of Subordinate Judge, Tiruvannamalai. Without any right the 1st defendant is managing the 'D' schedule property. This defendant is making attempts to file a suit for measne profits and also for possession of the suit 'D' schedule property. After coming to know about the steps taken by this defendant, the plaintiffs have filed this suit in collusion with the 1st defendant. This defendant has no objection for the plaintiffs in getting their due shares in the suit property. The 'D' schedule property is in possession and enjoyment of the 1st defendant who is collecting the rent and enjoying the 'D' schedule property. This defendant is not liable to pay any mesne profits or costs. Hence, the suit is liable to be dismissed.

5. The 4th defendant in his written statement would contend that the suit schedule property was kept in common in the family partition, to be administered by male descendants. After meeting the charitable expenses the balance amount must be divided equally among the four shares. Only the management was left with the male descendants. The balance amount can be apportioned among the 4 branches irrespective of the fact whether there is male descendant or female descendant present in a branch. As such the 1st plaintiff was given a share in the balance amount by Thukka Chettiar. The plaintiffs are now entitled to a share as prayed for. This defendant has no objection for the same. The 1st defendant is

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managing the plaint schedule property for the past 10 years. The 1st defendant is liable to pay the due shares to the plaintiffs. This defendant is not liable to pay any amount to the plaintiffs. Hence the suit is liable to be dismissed against this defendants.

6. In the additional written statement the 1st defendant would contend that the suit has been filed by the 1st and 2nd plaintiffs as the legal representatives of Kulandai Chettiar. As per the partition deed executed by Thukka Chettiar only the male descendants are entitled to perform the charity from the income derived from 'D' schedule property. Kulandai Chettiar had no male issues. As per the terms of the trust deed only Kulandai Chettiar is entitled to a share in the excess amount derived from the 'D' schedule property after performing the charity, but neither 1st plaintiff nor 2nd plaintiff have any right to claim any share in the 'D' schedule property. The suit has been field at the instance of one Murugan, a tenant of the shop belongs to the trust. Hence, the suit is liable to be dismissed.

7. On the above pleading the trial court has framed five issues for trial. P.W.1 & P.W.2 were examined and Ex.A.1 to Ex.A.7 were exhibited on the side of the plaintiffs. The 1st defendant has examined himself as D.W.1 and exhibited Ex.B.1 to Ex.B.3. After going through the oral and documentary evidence the learned trial judge has come to the conclusion that the plaintiffs are entitled to the relief as prayed for in the plaint and accordingly decreed the suit without costs. Aggrieved by the findings of the learned trial judge, the 1st defendant preferred an appeal before the Subordinate Judge, Tiruvannamalai, in A.S.No.30/1995. After scanning the evidence both oral and documentary the learned first appellate judge has concurred the findings of the learned Additional District Munsif and dismissed the appeal thereby confirming the decree and judgment of the trial Court. Hence, the second appeal by the 1st defendant before this Court.

8. The substantial questions of law involved in this second appeal are as follows:-

> "a) Whether Ex.A.2-partition deed in so far as it relates to trust properties, confer any valid right on the plaintiffs, when the original trust created under Ex.A.1-partition deed was not revoked as provided under Section 78 of the Indian Trusts Act, 1882?
>
> b) Whether in law, the terms and conditions stipulted under Ex.A.2 with respect to administration of trust properties and sharing of excess income derived therefrom, without getting the consent of D1's father, one of the beneficiaries are valid, enforceable and binding on D1 and his father when the Trust was originally created under Ex.A.1 and when D1's father was

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not a party to Ex.A.2-partition deed?

9. The points:-

9(a) Admitted facts are one Appadurai Chettiar had a son viz. Thukka Chettiar through first wife and three sons viz. Kulandai Chettiar, Venugopal Chettiar and Thiyagarajan through second wife. There was a partition under Ex.A.1 between Appadurai Chettiar and Thukka Chettiar, the son through first wife, and Kulandai Chettiar, Venugopal Chettiar and a six months male baby (Thiyagarajan). At the time of Ex.A.1 Kulandai Chettiar, Venugopal and Thiyagarajan were minors. There are four shares to Ex.A.1-partition deed. The dispute centres around in respect of 'D' schedule property. As per the recitals in Ex.A.1-partition the income derived from the 'D' schedule property were exclusively set apart to maintain a charity. As per the terms of Ex.A.1, Appadurai Chettiar till his life time is to maintain the said charity and there is also a provision made for maintenance of Appadurai Chettiar's sister Chellammal. It has been specifically mentioned in Ex.A.1 that only a male descendants are entitled to administer the trust properties ('D' schedule property) as a manager. The further direction given in Ex.A.1 is that from out of the income derived from 'D' schedule property the trust is to be managed and the excess amount after performing the charity shall be divided among the four sons and the father viz. Thukka Chettiar, Kulandai Chettiar, Venugopal Chettiar, Thiyagarajan and Appadurai Chettiar in equal moieties.

9(b) As per the terms of Ex.A.1 till the life time of Appadurai Chettiar he alone is entitled to manage the trust and after his death Thukka Chettiar shall administer the trust, as the eldest descendant of the family and he has to take one share and other male descendants viz., Kulandai Chettiar, Venugopal Chettiar and Thiyagarajan and their male descendants if any are each entitled to one share in the excess income derived from 'D' schedule property after performing the charity.

9(c) The learned counsel appearing for the appellant relying on the above said recital in Ex.A.1 would contend that only the male descendants alone are entitled to a share in the excess amount in 'D' schedule property, and the first plaintiff, the wife of the Kulandai Chettiar, and the second plaintiff, the daughter of Kulandai Chettiar, are not entitled to any share in the 'D' schedule property. An important point to be noted in this case is that on the date of execution of Ex.A.1 Thukka Chettiar, Kulandai Chettiar, Venugopal Chettiar and Thiyagarajan and Appadurai Chettiar were all alive and subsequent to the death of Appadurai Chettiar, Thukka Chettiar became the manager to administer the 'D' schedule property to perform the charity. On 19.12.1939 there was an another partition deed entered into between Kulandai Chettiar, Venugopal Chettiar, Thiyagarajan and Appadurai Chettiar. At that time Thukka Chettiar has left the family, which necessitated the other male members of the family to enter into a partition deed Ex.A.2. The

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'D' schedule property to Ex.A.1 is 'E' schedule property to Ex.A.2. The exact recital in Ex.A.2 runs as follows:-

" E ெவிட்டியூல் சொத்தை வாடகைக்கு விட்டு அந்த வாடகை வருமானத்தைக் கொண்டு நு ெவட்டியூல் சொத்துக்கு செய்ய வேண்டிய நிய்மேங்களை செய்தும் அடியிற்கண்ட தர்மனகங்கிரியங்களை நடத்திவந்தும் மேல் சொல்லிய.ள்ள செல்லம்மாளின் ஜீவனம்சம் கொடுத்துவந்தும் அதுபோக மிகுதியாகும் பிரதிவருஉதுகையை 5 பாகமாக்க நாம் நால்வரும் நம்குடும்பத்தினின்று ஏற்கனவே பாகம் பிரித்துக் கொண்டு தனிமையில் இருக்கும் துக்கா செட்டியாரும் ஆளக்கொருபாகமாக அடைய 1 லக்கமிட்டவர் பிரித்துக் கொடுத்து வந்தும் இவ்விதமாக மேற்படி 1 லக்கமிட்டவர் மானேஜ்மெண்டு செய்துவரவேண்டியது நம்மில் மேற்சொல்லிய துக்கா செட்டியாரும் அவருக்குப் பின நம் குடும்பத்தில் முத்த ஆண்வாரிசும் மேற்படி மானேஜ்மெண்ட் ஒதாவை அடைந்து **E** ெடியூல் சொத்தின் வருமானத்தைக் கொண்டு தர்மகைங்காியங்களை செய்துவந்தும் செல்லம்மாளின் ஜீவனாம்சம் கொடுத்துவந்தும் மிகுதியாகும் துகையை மானேஜர் ஒதாவைபார்த்துவரும் நபர் நாலு சமகாகமாக்கி மேல்கண்ட வீதம் தனக்கும் தன் சகோதராக்கும் பங்கிட்டு கொடுக்க வேண்டியது "

9(d) The above said recital will go to show that Thukka Chettiar, the eldest male member of the family who is a party to Ex.A.1 had separated himself after Ex.A.1-partition deed. But even under Ex.A.2 a share has been given to Thukka Chettiar. But a difficulty arose as to who is the next male member to administer the charity. So Appadurai Chettiar appointed himself as a manager to administer 'E' schedule property to Ex.A.2-partition deed. Even under Ex.A.2 it has been specifically stated that from out of the excess income from 'E' schedule property to Ex.A.2, Appadurai Chettiar, Kulandai Chettiar, Thiyagarajan are each entitled to equal share from the excess income from 'E' schedule property to Ex.A.2.

9(e) The learned counsel would vehemently contend that the recital in Ex.A.2 that 4 persons viz. Appadurai Chettiar, Kulandai Chettiar, Venugopal Chettiar and Thiyagarajan are each entitled to an equal share in the excess amount got from 'E' schedule property to Ex.A.2 and that the brothers are entitled to a share in the excess amount derived from 'E' schedule property among themselves and the plaintiffs relying on the above said recital have filed the suit and that the plaintiffs are not male descendants of the family and that they are not entitled to any share in 'E' schedule property to Ex.A.2 as per the recitals therein. The learned counsel for the appellant relying on Section 78 of the Indian Trust Act, 1882, would contend that Ex.A.2 partition deed itself is not a valid one because the trust created under Ex.A.1 cannot be revoked under Ex.A.2. In

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support of his contention, the learned counsel for the appellant would rely on 27 MLJ 580 (Krishnansami Pillai Vs. Kothandarama Naicken and others). The short facts in the above said case are as follows:-

> "On 11th November 1894 one Nilayathakshi executed a deed of trust (Exhibit 1) by which she settled certain properties on a temple. But she constituted herself as the trustee during her life time and provided in the said deed for the carrying out of the trust by certain individuals after her death. She died on 12th April, 1907. On the day previous to her death she executed a will by which she purported to revoke Exhibit 1 and to make a new disposition of her properties. The dispositions themselves were in favour of the temple to which she had given the properties comprised in Exhibit 1. The suit was brought for a declaration that the will(Exhibit IV) of the year 1907 is inoperative and has not the effect of revoking the trust of 1894.
>
> It was contended on behalf of the defendant that since there is a valid dedication even under the second deed it cannot be said that the conduct of the settlor is nugatory.
>
> But negativing the contention, it has been held by a Bench of this Court that as per Section 78 of the Indian Trust Act, the second will without revoking the first one is invalid."

Section 78 of the Indian Trust Act, 1882, runs as follows:-

> "Revocation of Trust:- A trust created by will may be revoked at the pleasure of the testator. A trust otherwise created can be revoked only-
>
> (a) where all the beneficiaries are competent to contract – by their consent;
>
> (b) where the trust has been declared by a non-testamentary instrument or by word of mouth – in exercise of a power of revocation expressly reserved to the author of the trust; or
>
> (c) where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors – at the pleasure of the author of the trust."

So under Section 78 of the Indian Trust Act, a trust can be revoked at the pleasure of the testator viz. Appadurai Chettiar and his sons. Except only one son viz. Thukka Chettiar all the parties in Ex.A.1 are parties to Ex.A.2. Even though Thukka Chettiar was not a party, a share has been allotted to Thukka Chettiar in Ex.A.2 also. Ex.A.2 is of the year 1939. So far Thukka Chettiar has not raised any objection for Ex.A.2 on the other hand the evidence in this case is that as per Ex.A.2 shares have been given in 'E' schedule property to Ex.A.2 till the death of Kulandai Chettiar who is the

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husband of the 1st plaintiff. D.W.1 is the son of Thukka Chettiar, who is not a party to Ex.A.2. He would contend that he has filed O.S.No.262/78 before the Subordinate Judge, Tiruvannamalai, for a declaration that he must be appointed as a trustee in respect of 'D' schedule property to Ex.A.1 ('E' schedule property to Ex.A.2). He would admit that the present plaintiffs are not parties in O.S.No.262/78. He would admit in the cross-examination that his father Thukka Chettiar is now no more and that Rajamani and D.W.1 are the sons of Thukka Chettiar and that Venugopal Chettiar is now no more and his legal representatives are D4 to D6. He would admit that Ex.A.2 is a partition deed entered into between Appadurai Chettiar and his three sons in the year 1939 under Ex.A.2 and he would further admit that as per Ex.A.2 alone Appadurai Chettiar and his three sons got partition their family properties and they are in possession and enjoyment of the same. The categorical admission of D.W.1 is that his father Thukka Chettiar till his life time has given the due share to the plaintiffs. So the very admission of D.W.1 itself will go to show that as per the recitals in Ex.A.2 the plaintiffs were receiving their due shares in the amount derived from 'D' schedule property in excess of the same after meeting the expenses of the charity. Under such circumstances, it is not open to the contesting 1st defendant-appellant to contend that the plaintiffs cannot base their claim for the suit on the basis of the recital in Ex.A.2.

9(f) The other judgment relied on by the learned counsel for the appellant is AIR 1969 BOMBAY 101 (V 56 C 20) (Central Bank Executor & Trustee Co. Ltd., Vs. Hormusji Nusservanji Madraswalla and others), wherein it has been held that for revocation of the earlier trust deed a reservation must have been made in the earlier trust deed. The exact observation in the said judgment runs as follows:-

> "As against that argument of Mr.Laud, Mr.Nariman sought to contend that the said Deed of Revocation dated 15th October 1958, as drafted, did not bear out the contention of Mr.Laud, in so far as it did not provide for the new trusts created therein being incorporated in the original Deed of Settlement. Mr.Nariman also relied on the terms of clause 18 of the Deed of Settlement dated 22nd April 1942, whereby, according to him, the only power of revocation was to revoke the trusts "hereinbefore created", which would mean the trusts created by the original Deed of Settlement itself, and not the trusts as varied by the subsequent Deed of Revocation dated 15th October 1958. Mr.Nariman further submitted that, both under Section 78 of the Indian Trusts Act as well as under the corresponding provisions of law applicable to public trusts, a document creating a trust be revoked unless itself provides for a power of revocation therein."

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Even if the contention of the learned counsel appearing for the appellant can be taken for consideration on the ground that there is no reservation made in Ex.A.1 for revoking the same, Ex.A.2 cannot be valid, all the parties to Ex.A.1 are parties to Ex.A.2, except the first defendant's father viz. Thukka Chettiar. Thukka Chettiar was also given a share in Ex.A.2 and it is seen from the evidence of his son D.W.1 that Ex.A.2 has been acted upon and not challenged before a Court of law even during the life time of Thukka Chettiar himself nor D.W.1. D.W.1 has filed the suit O.S.No.262/78 before the Subordinate Judge, Tiruvannamalai, only for a declaration that he should be made as a trustee in respect of 'E' schedule property to Ex.A.2 ('D' schedule property to Ex.A.1). Even in O.S.No.262/78 the validity of Ex.A.2 was not challenged. According to the evidence of D.W.1, Ex.A.2 was acted upon and due share was given to the plaintiff from out of the excess amount of income derived from 'E' schedule property to Ex.A.2 to the plaintiffs also till the death of his father Thukka Chettiar. So under such circumstances, the facts of the above said dictum will not be applicable to the present facts of the case.

9(g) The learned counsel for the appellant also relied on 1973 ITR 261 (Thanthi Trust Vs. Income-Tax Officer), wherein it has been held as follows:-

> "It is well established that the subsequent acts and conduct of the founder of the trust cannot affect the trust if there has been already a complete dedication. If a valid and complete dedication had taken place, there would be no power left in the founder to revoke and no assertion on his part or the subsequent conduct of himself or his descendants contrary to such dedication would have the effect of nullifying it. If the trust had been really and validly created, any deviation by the founder of the trust or the trustees from the declared purposes would amount only to a breach of trust and would not detract from the declaration of trust. Therefore the subsequent conduct of the founder in dealing with the founds of the trust long after the creation of the trust may not put an end to the trust itself."

The above said dictum will also be not applicable to the present facts of the case because in that case the second trust deed executed in favour of one of the sons of the founder of the said trust was challenged. But as I observed earlier Ex.A.2 was not at all challenged by any of the parties to Ex.A.1.

9(h) The next judgment on which the learned counsel for the appellant based his reliance is JT 1988(6) SC 648 (Sri Agasthyar Trust, Madras Vs. Commissioner of Income Tax, Madras). The learned counsel relied on para 14 of the above said dictum, which runs as follows:-

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"As we have already observed, the deed of 1941 originally gave the power to the founders to revoke the Trust but this power was taken away by a subsequent document which was executed on 26.8.1943. It is thereafter that the Trust became an irrevocable trust. The powers of the trustee in respect of the said Trust continued to remain the same as set out in clause (8) of the partnership deed which has been extracted hereinabove. The said trustee was only required to carry out the objects of the Trust and spend the trust funds for charitable purposes in the manner indicated therein. No power was given to the trustee to amend, alter, vary or change in any manner to the objects of the Trust as created in 1941. The result of this is that neither the trustee nor the founders could bring about any change in the objects of the Trust as set out in their partnership deed dated 28.11.1941. This being so, the document dated 1.7.1944 executed by the trustee was clearly without any authority and was non est. He had no right or jurisdiction to execute the document of 1.7.1944 which in effect changed the objects of the Trust radically and in fact converted what was meant to be a public charitable trust to a non-charitable trust as held by this Court in East India Industries case when the deed dated 1.7.1944 was construed by it. It will be useful at this juncture to refer to the following passage from Tudor on Charities (6th Edn.) At P 131, it is stated as follows:-

> "When a charity has been found and trusts have been declared, the founder has no power to revoke, vary or add to the trusts. This is so irrespective of whether the trusts have been declared by an individual, or by a body of subscribers, or by the trustees."

There cannot be two opinion in respect of the findings of the Honourable Apex Court in the above said dictum. Only difference is that Ex.A.2 in the suit has not so far been challenged by any of the parties to Ex.A.1 and Ex.A.2. So the facts of the above said dictum will also not be applicable to the facts of the case on hand.

9(i) The learned counsel for the appellant also relied on 2000 AIR SCW 1949 (Neelu Narayani Vs. Lakshmanan), and 2002 (1) MLJ 557 (Liagat Ali Vs. Mohammed Nazir) and contended that under Section 100 CPC even though there was a concurrent findings of the Courts below, this court is competent to interfere with the concurrent findings if the courts below have erroneously applied the law. The March of law is that even if there is erroneous findings regarding the facts this Court sitting in the Second Appeal under Section 100

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CPC is empowered to interfere with the findings of the Courts below. But now the point is whether there is any erroneous finding of fact or law by the Courts below, to warrant interference from this Court. As per the recitals in Ex.A.1 only the male descendants are entitled to a share in the excess amount derived from 'D' schedule property, which is set apart for maintaining the charitable trust. If Kulandai Chettiar would have pre-deceased Appadurai Chettiar then the plaintiffs 1 & 2 being the female members of the family of Kulandai Chettiar will not be entitled to any share as per the recitals in Ex.A.1. But even during the execution of Ex.A.1 & Ex.A.2 Kulandai Chettiar was alive and as per the recitals in Ex.A.2 Kulandari Chettiar is entitled to receive an equal share to that of Appadurai Chettiar, Venugopal Chettiar, Thiyagarajan in the excess amount derived from 'D' schedule property to Ed.A.1 after meeting the expenses to maintain the charity. After the death of Kulandai Chettiar, the right already vested on Kulandai Chettiar cannot be divested on any account, as the wife and daughter of Kulandai Chettiar, viz., the paintiffs are, in my opinion, entitled to the share to which Kulandai Chettiar was declared under Ex.A.1. Under such circumstances, under the law and under the principles of natural justice, in my considered view, the plaintiffs are entitled to the declaration as prayed for in the suit. Even according to D.W.1 they were been given their due share even after the death of Thukka Chettiar, the father of D.W.1. Under such circumstances, I do not find any reason to interfere with the judgment of the Subordinate Judge, Tiruvannammalai, in A.S.No.30/1995, which is neither illegal nor infirm to warrant any interference from this Court. Points are answered accordingly.

10. In the result, the appeal is dismissed confirming the decree and judgment in A.S.No.30 of 1995 on the file of the Subordinate Judge, Tiruvannamalai, with costs.

ssv

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To,

1. The Subordinate Judge, Tiruvannamalai.

2. The Additional District Munsif, Tiruvannamalai.

3. The Section Officer, VR Section, High Court, Madras.

+ 1 cc to Mr. Sarvabhauman Associates, SR No. 15498

+ 1 cc to Mr. P. Mani, Advocate SR No. 15179

S.A.No.770 of 1997

MJ(CO)
SR/2.4.2007

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